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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1048

IN THE MATTER OF

PAUL MOSER, DOING BUSINESS AS MOSER BUSINESS
COLLEGE,

BANKRUPT.

MAURICE KLEIN, TRUSTEE IN BANKRUPTCY,
Petitioner,

vs.

MARY K. MOSER,
Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT.**

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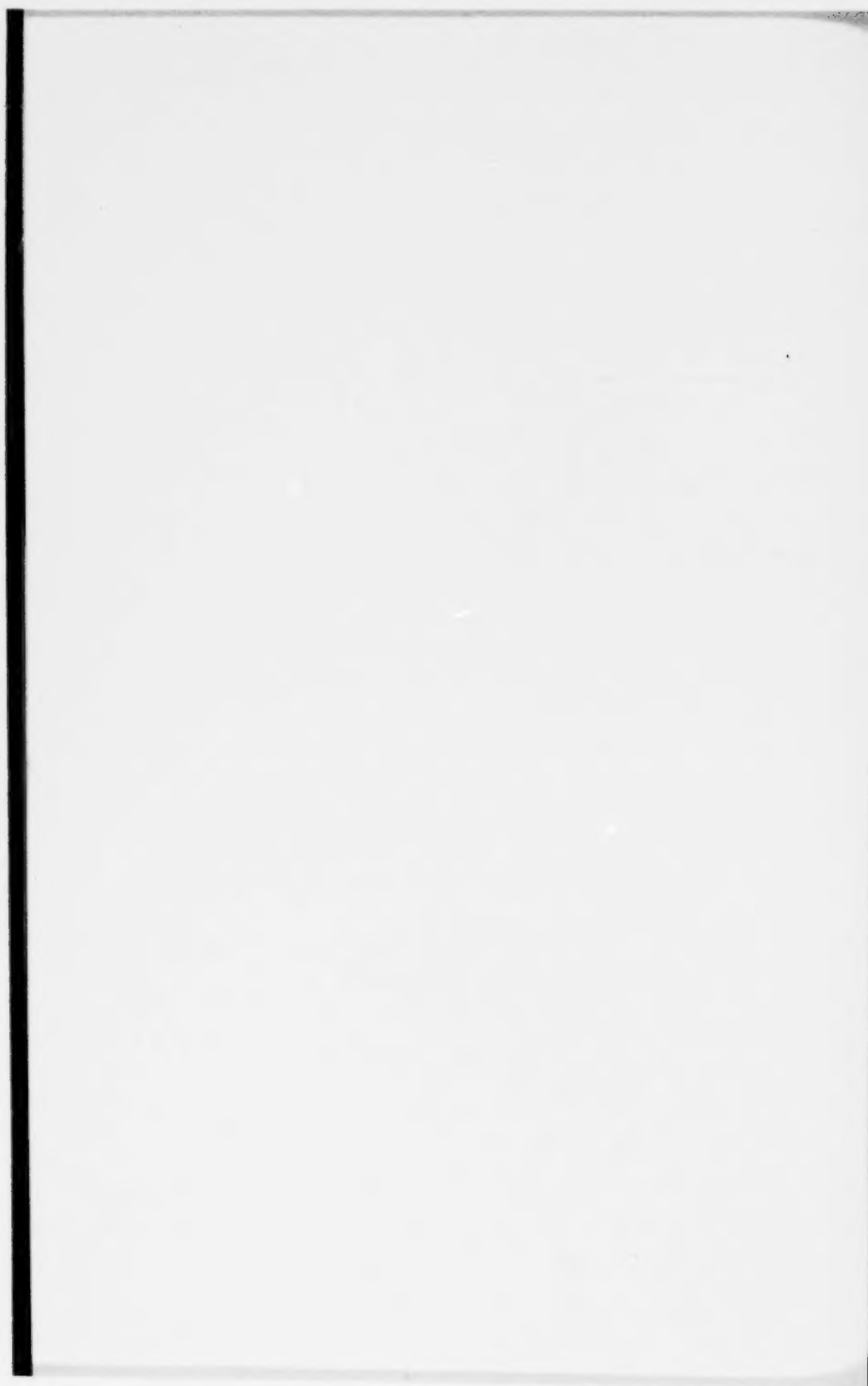
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STATEMENT OF THE CASE.

Petitioner's statement of the matter involved in the
Petition for Writ of Certiorari is incomplete.

The respondent, Mary Moser, filed a claim in the bank-
ruptcy proceeding of Paul Moser, her former husband, to
recover the unpaid monthly installments under a separa-
tion agreement made prior to the divorce, a copy of which

agreement is attached hereto as Appendix A. The Referee allowed the claim for \$3500.00 (R. 10). The Trustee in Bankruptcy filed a petition to review the order of the Referee (R. 11). The Referee prepared a certificate in which he set forth the issues of fact and law involved in the proceeding (R. 13). The District Court sustained the petition to review and disallowed the claim (R. 15). The Circuit Court of Appeals rendered its opinion deciding that the claim should be allowed and reversing the judgment of the District Court (R. 27-31). The opinion appears in 145 Fed. (2nd) 523.

The separation agreement (R. 5, 6), upon which the claim is based, was entered into on the 23rd day of July, 1929, between the bankrupt, Paul Moser, and his wife, the respondent herein, Mary K. Moser, at which time they were living apart. The agreement recites that the parties were married on the 25th day of October, 1919, and have been living separate and apart since May 22, 1928. After reciting that the parties thereto are "desirous of adjusting any and all rights of support, dower or inheritance, by reason of said marriage, and the * * * [wife] is and has been fully advised as to the assets, liabilities and financial condition of the * * * [husband], and is fully informed as to the amount of his income," the agreement provides that the husband shall pay \$400.00 a month to the wife so long as she lives and remains married to him, or in case a divorce shall be granted to either of them, but in case of her remarriage, the monthly payments may be reduced by the husband to \$300.00. The agreement further provides that in the event of the death of the husband, the payments shall be reduced to \$250.00 a month, and the unpaid installments shall be a charge upon his estate, to be secured by a sum in trust which his executors are directed to set aside unless the husband shall have made other provision to

secure and provide therefor by will or otherwise. In the agreement the wife agrees that she has made a full and complete investigation of the husband's financial affairs and actually knows the true condition thereof and that the provisions are fair and advantageous, and that she does thereby release and discharge the husband from any and all claim for support, maintenance or alimony, and solicitors' fees; and that each party mutually releases the other from any claim of award, dower, homestead, right of inheritance or any other benefit then or thereafter existing under the Illinois laws by reason of their marriage and pertaining to property then or thereafter acquired by the parties or either of them, it being the intention of the parties that the covenants of the agreement shall constitute a complete release and discharge of any claims arising during the lifetime of the parties or of any claim of either against, or any right of either to administer, the estate of the other. The agreement further provides that in case any decree is entered for divorce or separate maintenance in any suit between the parties, the provisions thereof should be incorporated in the decree and made a part thereof regardless of whether a divorce was granted by such decree, if any, to husband or wife.

After the execution of the agreement in July, 1929, the husband continued to make the monthly payments provided in the contract both before and after the divorce decree, and did so until *April 3, 1943*, although such payments were sometimes not at the full rate fixed in the contract (R. 14). In November, 1930, the husband obtained a divorce from the respondent upon the charge of desertion (R. 14). The provisions of the separation agreement are not incorporated in the decree, nor is any provision made for the support of the wife (R. 14). In January, 1943, the husband filed his voluntary petition in bankruptcy and the

respondent herein filed her claim in the proceeding. The parties stipulated that the amount, if any, due her is \$3500.00 (R. 13, 28).

There Is No Basis for the Issuance of a Writ of Certiorari.

Petitioner in his brief (pp. 4, 7) relies upon Rule 38, Paragraph 5 (b) of this Court as a formal basis for the issuance of a Writ, in that the Circuit Court of Appeals has decided an important question of local Illinois law contrary to the settled law of the State of Illinois. But petitioner has not shown that the rule is applicable to the facts and decision of the Court of Appeals in this case.

In the opinion (p. 525) of the Circuit Court of Appeals, the Court quoted the following from the opinion of the Illinois Supreme Court in *Van Koten v. Van Koten*, 323 Ill. 323, cited by petitioner:

“The law in this State is well settled that a husband and wife may by a written post-nuptial contract, based upon a valuable consideration, release to each other his or her rights in the other's property and estate, and thereby extinguish all rights, including the inchoate right of dower. * * * Agreements between husband and wife for a separation are not *per se* illegal or invalid, but where a husband and wife are living separate and apart, or where the circumstances are such that they can no longer congenially live together with the mutual confidence and implicit faith in each other which the sanctity of the marriage relation demands, or where the relations between them are such as to render the separation necessary for the health or happiness of one or the other of them, an agreement between them, fairly and understandingly entered into, adjusting and settling their mutual rights in each other's property, may be lawfully made, * * * and a provision in such contract under such circumstances that the husband will pay to the wife a certain sum

each month for her support is not void as against public policy. * * *

The Circuit Court of Appeals then said (p. 525):

"We are of the opinion that nothing in the contract before us contravenes these principles, and we find nothing in the authorities relied upon by appellee compelling us to hold it contrary to public policy. It was entered into for the purpose of adjusting all marital rights and obligations. It provided adequate support for the wife in the light of her husband's financial circumstances which were fully investigated and understood by her. Although the contract in terms releases and discharges the husband from all claims for support and other marital obligations, such provision must be interpreted in the light of the circumstances shown by other provisions thereof, and so construing it, we fully agree with the referee who stated that this contract was not to avoid the legal liability to support, but to recognize it and make provisions for meeting that obligation."

From the foregoing it is apparent that the decision of the Circuit Court of Appeals is based upon, and is in conformity with, the settled Illinois law.

The Question in This Case.

The sole question in this case is whether the separation agreement entered into between the parties on July 23, 1929, is a legal and enforceable contract or an illegal and unenforceable one as being contrary to the public policy of the State of Illinois.

ARGUMENT.

I.

This Contract Knowingly Entered Into Between Husband and Wife for the Purposes of Adjusting Their Marital Rights of Support, Dower and Inheritance, and Providing for Monthly Payments to Be Made by the Husband to the Wife During Her Lifetime Regardless of Whether They Continued to Be Husband and Wife, and While Not Contemplating a Divorce, Nevertheless Providing for such Contingency, Is a Valid and Enforceable Contract Although the Agreement Was Not Incorporated in a Subsequent Decree of Divorce.

Petitioner's assertion that the contract is void because the husband is relieved of his duty to support the wife, ignores the language of the agreement and the purpose of such agreement, which was to provide for the support of the wife. As the Illinois Supreme Court has repeatedly held, a husband cannot by contract relieve himself of the duty imposed by law to support the wife, but where the parties, in recognition of the husband's duty, enter into a contract defining the extent of such support (there being no question of fraud or unfairness), such contract is for all purposes a legal and enforceable contract whether the same be embodied in subsequent divorce decree or not.

In *Adler v. Adler*, 373 Ill. 361, the Court held that where the parties to a divorce action entered into an agreement providing for the wife's support, and the agreement was adopted in a decree in that action, it was subject thereafter to modification by the Court. As to the capacity of husband

and wife to make a valid contract providing for the wife's support, the Court said (p. 369):

"Husband and wife, parties to a divorce action, may, as an act entirely separate and apart from such action, contract in respect to her future support."

In *Hallam v. Hallam*, 298 Ill. App. 445, a post-nuptial contract provided that in consideration of the creation of an annuity in favor of the wife, payable at the rate of \$200.00 per month, by depositing with an insurance company the sum of \$1,439.00, together with the conveyance of other personal property to the wife, the wife released "all her right to any widow's award, or other claim against Hallam, or his estate, in case of his death, including any claim for alimony, maintenance or support, past, present or future, except as provided by the annuity." The Appellate Court upheld the contract, saying at page 452:

"In our opinion, Hallam did not seek to avoid his obligation, but, on the contrary, met it by creating this annuity as agreed."

In *French v. French*, 302 Ill. 152, the Court considered the validity of a separation agreement alleged to have been entered into between a husband and wife, whereby the husband agreed to pay to his wife as long as they should live separate and apart One Hundred Seventy-five Dollars (\$175.00) per month for the maintenance and support of herself and her son. In holding that such an agreement was not void as against public policy, the Court said at page 161:

"We do not think the agreement entered into between the parties for separate maintenance comes within the rule that makes such agreements void as against public policy, or that the same bars recovery in this case by complainant. It was made at a time, according to the charges in her bill, when she had a right to live separate and apart from him and at a time when she was entitled to separate maintenance, and when he

refused to longer carry out the contract she had a legal right to bring and maintain this suit for separate maintenance."

In the following cases the wife released her right to support during her lifetime, either in consideration of release by the husband of all rights in the wife's property if he survived her, or in consideration of the payment by the husband of a lump sum; and such contracts were held invalid:

Lyons v. Schanbacher, 316 Ill. 569, 573 (release by husband);

Van Koten v. Van Koten, 323 Ill. 323, 327 (lump sum payment);

Vock v. Vock, 365 Ill. 432, 434 (lump sum payment).

The distinction which petitioner overlooks is that in one class of cases the duty to support the wife was recognized by an agreement which provides for performance of the duty during her lifetime. In another class of cases such as the three last cited, no provision was made for performance of the obligation to support her during her lifetime; and the payment in a lump sum subjects the wife to the possibility of being without support if the lump sum settlement should be lost, stolen or used by her immediately for her care, support, or otherwise.

In the case now before the Court, the parties at the time of making the contract recognized the husband's duty and contracted for its fulfillment during the lifetime of the wife, and the husband for over 14 years continued to recognize that duty and the contract's provisions defining it.

It is respectfully submitted that the Circuit Court of Appeals was correct in deciding that a contract for the payment of a reasonable monthly sum of money by the husband to the wife during her lifetime is a valid and enforceable contract.

II.

The Fact That a Default Decree for Divorce Was Secured by the Husband on the Ground of Desertion Does Not Abrogate the Pre-existing Separation Agreement.

At page 11 of his brief, the petitioner asserts that an allowance for separate maintenance can be made only where the separation is without the fault of the wife. It appears from the opinion in *Van Koten v. Van Koten*, 323 Ill. 323, quoted hereinabove (p. 4) that agreements settling their mutual rights in each other's property may be lawfully made by husband and wife when they "are living separate and apart." It appears from the contract here (Appendix A) that on July 23, 1929, when the parties made the contract, they were living separate and apart.

Both *Vock v. Vock*, 365 Ill. 432, and *French v. French*, 302 Ill. 152, 161, cited by petitioner (p. 11), were suits for an allowance of separate maintenance under the statute, which obviously was not the case here.

The husband obtained a *divorce* from the respondent in November, 1930, and the decree made no provision for alimony and did not incorporate the pre-existing separation agreement. Under these circumstances the separation agreement providing for the continued support of the wife was not abrogated by the divorce decree. The bankrupt, Paul Moser, recognized such fact and continued his payments for over 13 years after the decree of divorce and until shortly before the filing of the voluntary petition in bankruptcy.

In *Adler v. Adler*, 373 Ill. 361, the Illinois Supreme Court said at page 369:

"The Divorce statute of this State has been construed to allow alimony to an erring wife, where all the facts and circumstances warrant the Court in so

doing; the objective, in the exercise of such right, is to prevent the imposition of an unjustifiable hardship in a given case that would ensue if the general rule was applied. (Ill. Rev. Stat. 1939, chap. 40, par. 19; *Deenis v. Deenis*, 65 Ill. 167; *Spitler v. Spitler*, *supra*.) Husband and wife, parties to a divorce action, may, as an act entirely separate and apart from such action, contract in respect to her future support."

Lyman v. Lyman, 268 Ill. App. 274, involved a separation agreement which was not incorporated in a subsequent decree for divorce. The agreement included a provision that the husband should pay the sum of \$150 per month to the wife for her support, and that in the event the wife obtained a divorce and remarried, all payments should cease. The Court said in the opinion at pages 276 and 277:

"We do not consider, however, that the decree affects the rights of the plaintiff. It was a default decree and contains no provision for alimony, nor does it subject the defendant to the payment of any moneys to the wife. The separation agreement itself was valid and not contrary to public policy. It was entered into according to its terms after the parties had separated and were living apart. It contained a provision under which the husband was obligated to support the wife and the courts have recognized the right of a husband and wife to enter into an agreement to live separate and apart, provided provision is made for the wife's support in the agreement. *Galusha v. Galusha*, 116 N. Y. 635; *Hirschthal v. Hirschthal*, 134 N. Y. Misc. 479; *French v. French*, 302 Ill. 152; *Patterson v. Patterson*, 111 Ill. App. 342; *Van Koten v. Van Koten*, 323 Ill. 323.

The agreement contemplated that either party might thereafter obtain a divorce, if just cause arose, but this did not vitiate the agreement, nor would the obtaining of a decree by the wife amount to a waiver of her right to support under the agreement. The parties themselves by their agreement contemplated such a possibility, and provided that in the event the wife

should thereafter remarry, then, and then only, the payments should cease. The obtaining of the divorce did not terminate the agreement, inasmuch as no provision was made in the decree for support. If a provision for alimony had been made, it may be that the separation agreement would have become merged in the decree. *Galusha v. Galusha*, 116 N. Y. 635; *Hirschthal v. Hirschthal*, 134 N. Y. Misc. 479; *Patterson v. Patterson*, 111 Ill. App. 342.

We see nothing in the agreement contrary to the policy of this State nor the State of New York, where the contract was entered into."

In the instant case, in the opinion of the Circuit Court of Appeals (R. 29), the Court, after quoting a portion of the opinion in *Adler v. Adler*, 373 Ill. 361, said:

"Hence it seems that there is no fixed rule denying support even to an erring wife, and the fact that the default decree of divorce in this case did not incorporate the provisions of the contract, as provided by its own terms, is no reason for declaring the contract unenforceible."

Conclusion.

The Circuit Court of Appeals properly reversed the judgment of the District Court and properly decided that the claim of respondent should be allowed in order to permit her to share in the distribution of the bankrupt's estate with other creditors.

Petitioner respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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